

FILED
COURT OF APPEALS
DIVISION II

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON

DIVISION TWO

BY

8
DEPUTY

NO. 49436-1-II

DONALD MURIDAN

Appellant,

v.

NICOLE REDL,

Respondent

REPLY BRIEF OF APPELLANT

Submitted by:

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I.

INTRODUCTION

Mrs. Redl's response brief demonstrates that she has no answer – legal or factual – to the various arguments set forth in Mr. Muridan's opening brief.

Of the five assignments of error raised by Mr. Muridan, Ms. Redl has **completely ignored** three of them. She does not even acknowledge that they exist.

Since these assignments of error are unopposed, this Court should consider summarily deciding this case without oral argument, as authorized by RAP 11.4(j).

The unopposed assignments of error are:

1. The trial court failed to undertake the mandatory “three-prong” analysis that is required in CIR cases (Assignment of Error One);
2. The assets which the court divided were Mr. Muridan's separate properties, and therefore not subject to equitable distribution (Assignment of Error Three);
3. The trial court distributed the assets without considering the economic circumstances of the parties, which is an essential factor that must be considered before a distribution may occur (Assignment of Error Four).

The suggestion for a summary decision in this case is particularly relevant with respect to Assignment of Error Three, which pertains to the separate property agreement that existed between the parties.

If this Court agrees that the assets in question were controlled by a separate property agreement and therefore not subject to equitable division, then all it needs to do is enter an order which vacates the portion of the judgment relating to those assets. Such a ruling would make all other issues raised by this appeal moot and irrelevant.

Ms. Redl's primary opposition to Mr. Muridan's appeal – effectively, her only opposition – concerns Assignment of Error Two, which relates to the issue of whether a CIR existed.

Even here, however, Mr. Redl's brief completely ignores Mr. Muridan's main argument, which is that while a CIR may have existed at some point in the relationship, a CIR did not exist in **August, 2014**, which was the date when Mr. Muridan acquired his interest in JAR Mgmt. Rather than address this point, Ms. Redl “talks around” it by presenting a host of “off the point” arguments that go nowhere.

The bottom line is that Ms. Redl has failed to provide this Court with any competent reason -- legal or factual -- as to why Mr. Muridan's appeal should not be granted. Accordingly, this Court should summarily reverse and vacate the trial court's decision.

II.

ARGUMENT

A. NO REPLY IS NECESSARY WITH RESPECT TO THE THREE UNOPPOSED ASSIGNMENTS OF ERROR

Ms. Redl's brief completely ignores three of the five assignments of error presented by Mr. Muridan. Accordingly, reply argument by Mr. Muridan concerning these unopposed assignments of error is neither necessary nor appropriate. He will simply stand upon what has been stated in his opening brief:

1. **Assignment of Error One:** *The trial court did not understand or apply the mandatory "three-prong" analysis for CIR cases.*

See: Opening Brief of Appellant at pages 4-30 (Statement of Facts); pages 31-34 (Argument).

2. **Assignment of Error Three:** *The trial court erred as a matter of law in concluding that the assets it distributed were "quasi-community" properties.*

See: Opening Brief of Appellant at pages 4-30 (Statement of Facts); pages 41-45 (Argument).¹

3. **Assignment of Error Four:** *The trial court abused its discretion by failing to consider the economic circumstances of the parties when making its equitable distribution.*

See: Opening Brief of Appellant at pages 45-48 (Argument).

¹ Like the trial court, Ms. Redl does not understand the law. Her brief reflects the flawed assumption that if an asset is "*acquired*" or "*accrued*" during a CIR relationship, then the asset is automatically subject to equitable distribution, e.g., see Respondent's Brief at p. 8. This is false. Regardless of when an asset is acquired, it will only be subject to equitable distribution if the asset can be properly characterized as "*quasi-community*" property. In CIR cases, trial courts have a mandatory duty to inquire whether assets that were acquired during a CIR relationship should be characterized as "*separate property*" or "*quasi-community property*." See Opening Brief of Appellant, p. 31.

**B. A COMMITTED INTIMATE RELATIONSHIP DID NOT EXIST
IN AUGUST, 2014 (Assignment of Error Two)**

Mr. Muridan's argument under Assignment of Error Two is that to the extent a CIR ever existed, it clearly **did not** exist in **August, 2014**, which is the date when he acquired his interest in JAR Mgmt. See Opening Brief of Appellant at pages 34-41.

Ms. Redl does not address this specific argument. Instead, she only makes the generalized claim that a CIR existed throughout the time that she and Mr. Muridan lived in the same house. See: Respondent's Brief, pp. 1-8.

1. Ms. Redl Does Not Understand the Standard of Review

Ms. Redl's brief shows that she does not understand the applicable standard of review. This is evident from her argument that the trial court's "finding" that a CIR existed should be upheld because it was "*supported by substantial evidence.*" See: Respondent's Brief, p. 4. This is the wrong standard of review.

The ultimate question of whether a CIR existed **is not** a factual question. Instead, it is a **legal question** that is reviewed under a "de novo" standard of review. *Marriage of Byerley*, 183 Wn.App. 667, 686, 334 P, 2d 108 (2014).

Since this Court applies a de novo standard of review with respect to the ultimate question of whether a CIR existed, the Court's task on appeal is to determine whether, under the totality of all undisputed evidence and findings of fact, the trial court was correct in concluding that a CIR existed.

2. Ms. Redl's Arguments Concerning the Lack of Sexual Intimacy are Misplaced

Ms. Redl's brief focuses upon the undisputed fact that there was a complete lack of sexual intimacy between the parties. She argues that this fact should not be "the 'up or down' litmus test" for determining whether a CIR existed. Respondent's Brief, p. 4.

Mr. Muridan fully agrees.

Standing by itself, the lack of sexual intimacy between the parties is not dispositive as to whether a CIR existed. The same thing is true with respect to Ms. Redl's infidelity, and her formation of an intimate relationship with another man, John Sidell.

While these facts provide compelling evidence that the relationship was neither "*committed*" nor "*intimate*" (see discussion below, pp. 8-11), these facts are not, by themselves, dispositive.

The determination of whether a CIR existed does not turn upon any one factor. *Marriage of Pennington*, 142 Wn2d 2d 592, 602, 607, 14 P.3d 764 (2000). Instead, the determination turns upon a "totality of circumstances" approach where all relevant factors must be considered. *Id.*

While the Supreme Court has identified a number of "useful" factors that should be considered by trial courts, those factors "are neither exclusive nor hyper-technical but rather, are a means for examining all relevant evidence." *Pennington*, *supra*, 142 Wn.2d at 602; 603-607.

3. Ms. Redl Does Not Dispute the Accuracy of Mr. Muridan's Statement of Facts

Ms. Redl has not disputed the fairness and accuracy of Mr. Muridan's statement of facts. See Opening Brief of Appellant, pages 4-30; *Compare: Respondent's Brief*, pages 1-11. Nor has she disputed any of the specific facts that are recited therein. *Id.*

The undisputed facts are as follows:

a. Facts Pertaining to Emotional and Physical Interactions:

- The parties “hardly ever talked” and had poor communication skills (Opening Brief of Appellant at pp. 10, 13);
- The parties did not “get along” with each other (*id* at p. 10);
- Witnesses from both sides confirmed that the relationship was marred by frequent conflicts and emotional outbursts (*id* at pp. 9-10);
- There was a complete absence of any sexual or physical intimacy between the parties (*id* at p. 7);
- Neither party testified that they ever loved each other (*id* at p. 11);
- No witnesses testified that the parties were emotionally close or loved each other (*id* at p. 11);
- No witnesses testified that the couple was ever seen to engage in any displays of affection (*id* at p. 11);
- Both parties agreed that by the summer of 2014, the relationship had turned into nothing more than a “co-parenting relationship” (*id* at pp. 7, 13).

b. Facts Pertaining to Separate Incomes and Living Expenses:

- The financial relationship between the parties was governed by the adage, “*what is mine is mine, what is yours is yours*” (*id* at pp. 21, 27);
- Neither party ever had any expectation of sharing in the other party's income (*id* at pp. 21-22);

- The parties did not pool their income, but instead, kept their earnings separate and distinct from each other (id at p. 21);
- Living expenses were not paid from a pooled fund, but instead were paid for via pre-arranged and defined contributions from each party's separate incomes (id at pp. 21-22).

c. Facts Pertaining to Assets and Debts:

- The parties kept their debts separate, including mortgage payments, student loans, credit card debts and bank loans (id at pp. 23, 25);
- Mr. Muridan's 2013 bankruptcy was filed solely on his behalf, and did not involve Ms. Redl in any way (id at p. 11);
- Each party had separate real estate which the other party did not contribute to or share in (id at pp. 23-24);
- The parties each had separate vehicles, title to which were in their separate names (id at pp. 11, 24);
- Ms. Redl paid for her own car insurance (id at p. 11).

d. Facts Pertaining to Checking and Retirement Accounts:

- The parties had separate checking accounts which the other party did not have access to (id at pp. 21-22);
- Each party contributed to his/her own separate retirement accounts (id at p. 24);
- No commingling of separate funds ever occurred (id at p. 23);
- The only joint bank account that the parties ever had was the one that Mr. Muridan created shortly before the relationship ended (in September, 2014) to keep Ms. Redl "happy." However, only his income – never Ms. Redl's income -- was deposited into this account (id at pp. 14-15, 23).

e. Facts Pertaining to Mr. Muridan's Businesses:

- Ms. Redl admitted at trial that she never had any expectation in sharing in Mr. Muridan's income (id at pp. 21-22);
- Ms. Redl never claimed an interest in Mr. Muridan's businesses while they were living together (id at p. 23);

- The first time Ms. Redl claimed an interest in Mr. Muridan's businesses was after the parties separated and her lawyer filed a petition for dissolution (id at p. 23);
- Ms. Redl never contributed financially to Mr. Muridan's businesses, nor was she ever involved in the businesses in any way (id at pp. 27-28);
- Ms. Redl testified that her only "contributions" to Mr. Muridan's businesses involved things such as providing input as to what color to paint his buildings and attending social functions such as an office Christmas party and a business dinner (id at pp. 27-28).

f. Facts Pertaining to Intent

- The parties only discussed marriage once, which was in 2010 after their son Donnie was born. Thereafter, no discussion of marriage ever occurred (id at p. 6-7);
- The parties never registered as domestic partners under the Washington Domestic Partnership Act, RCW 26.60 (id at p. 7);
- In March, 2014, Ms. Redl formed an intimate relationship with another man, John Sidell (id at pp. 12-13);
- Ms. Redl's relationship with Mr. Sidell was not a "fling" or casual affair, but instead, was a serious and committed relationship that resulted in both pregnancy and marriage (id at pp. 12-13, 18, 20);
- By the summer of 2014, both parties "wanted out" of the relationship (id at p. 13).

4. Two Facts are Particularly Significant in this Case

While the existence of a CIR must be determined from the totality of all circumstances, in this case two facts are particularly significant:

- a. By the summer of 2014, both parties “wanted out” of the relationship.

It is undisputed that by the summer of 2014, both parties wanted out of the relationship.² This fact goes to the very heart of whether a CIR existed.

By definition, a “committed intimate relationship” is a relationship in which both parties are “committed” to the relationship. Obviously, the fact that both Ms. Redl and Mr. Muridan “wanted out” makes it impossible to conclude that they were “committed” to the relationship. Clearly, they were not.

The same thing is true with respect to “intimacy” (both physical and emotional), which is a fundamental hallmark of truly committed intimate relationships.

By August, 2014, the relationship between Mr. Muridan and Ms. Redl could not possibly be said to have been “intimate.” There was no intimacy of any kind between the parties.³ Ms. Redl was only staying in the relationship for the benefit of her son.⁴ The same thing was true for Mr. Muridan. He was just “going through the motions” and staying in the relationship so his

² See RP vol. 4 at p. 11, line 1-19; p. 25, line 22 to p. 26; RP vol. 3 at p. 307, lines 4-10; p. 317, line 17 -24.

³ RP vol. 3 at p. 266, lines 10-21; vol. 3 at p. 303, line 19 to p. 304, line 4; vol. 3 at p. 304, lines 1-5.

⁴ RP vol. 4 at p. 11, line 1-19; RP vol. 4 at p. 25, line 22 to p. 26, line 6.

son would not grow up in a “broken family.”⁵ Had Donnie not been born, he would have left the relationship years earlier.⁶

The “bottom line” is that in **August, 2014**, the relationship between Mr. Muridan and Ms. Redl was loveless, cold and barren, with both parties “wanting out.” Under these circumstances, it cannot possibly be said that the relationship was either “*committed*” or “*intimate*.”

b. Neither Party Testified that they Ever Loved Each Other

Anyone who lives in the real world understands there are many happy marriages and partnerships in which there is little or no sexual intimacy. Clearly, meaningful committed relationships can -- and do -- exist without sex.

But it is rare to find any successful marriage or partnership in which each party will not express love and appreciation for the other. Love and appreciation is the cement and foundation for a truly committed relationship.

In this connection, one of the most striking facts about Mr. Muridan’s and Ms. Redl’s relationship is that they did not ever love each other.

Significantly, at no time during the trial did either Mr. Muridan or Ms. Redl **ever testify that they had ever loved each other**. Likewise, except for cursory acknowledgements that the other party was an attentive parent, neither party ever praised the other, nor did either party testify as to any

⁵ RP vol. 3 at p. 307, lines 4-10; vol. 3 at p. 317, line 17 -24.

⁶ RP vol. 3 at p. 317, lines 17-18.

appreciation for virtues of the other party which may have kept him/her in the relationship.

The sad truth is that in **August, 2014**, mutual love and appreciation did not exist between the parties, and it probably never existed.

c. The Facebook Posting of November 22, 2014 Should Not Be Given Significant Weight

Ms. Redl has pointed to a Facebook posting that Mr. Muridan made at the very end of the relationship (in November, 2014) in which he stated, among other things, that Ms. Redl was “the love of my life.”

This posting should not be accorded any significant weight for various reasons.

First, the timing of this posting is important. It was posted at the **very end of the relationship**, when Mr. Muridan recognized that the relationship was “obviously going south,” and suspected (but had not yet confirmed) that Ms. Redl had formed an intimate relationship with someone else. As Mr. Muridan explained at trial, the Facebook posting was made as part of his efforts to keep Ms. Redl “happy.” RP vol. 3, p. 313, line 17 to p. 314, line 9. He hoped that somehow, she would see the posting and thereby be persuaded to not follow through with her repeated threats to make him “a weekend father.” Id. **Mr. Muridan’s worst fear was losing his son.**

Second, anyone who is experienced in the ways of the world will recognize that at the final stages of a doomed relationship, people will often engage in emotionally overblown and maudlin ways. This was certainly true

for Mr. Muridan. The emotional fears and insecurities that lie behind his posted words are obvious. Mr. Muridan was an emotional wreck.

Most important of all, the posting fell on deaf ears.

The posting did not, in any way, change the reality that Ms. Redl was fully engaged in an intimate relationship with John Sidell, and that she had no intention of returning to Mr. Muridan. Stated differently, the posting did not change the undeniable fact that the relationship between Mr. Muridan and Ms. Redl had effectively ended months earlier.

5. The Trial Court Erred as a Matter of Law in Concluding that a CIR Existed in August, 2014

When the totality of all circumstances presented, there can be no question that a CIR did not exist in **August, 2014**, which is the date when Mr. Muridan acquired his interest in JAR Mgmt LLC. The trial court's finding in this regard should be reversed.

C. THE TRIAL COURT'S VALUATION OF ASSETS WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE (Assignment of Error Five)

1. Ms. Redl Does Not Dispute Mr. Muridan's Statement of Relevant Law

Ms. Redl has not disputed that there are two rules of law that apply to the trial court's valuation of the assets:

- a) In dissolution cases, courts have a duty to properly value assets that are subject to equitable distribution. *Greene v. Greene*, 97 Wn.App. 708, 986 P.2d 144 (1999); and
- b) Where monetary assets involve future payments over time, trial courts must discount the assets to present cash value.

See: *In Re Marriage of Pilant*, 42 Wn.App. 173, 709 P.2d 1241 (1985).

2. There are No Findings of Fact to Inform This Court as to How the Trial Court Determined the Value of the Assets

Ms. Redl does not dispute that the trial court never made any findings, verbal or written, to indicate how and why it arrived at the figure of \$775,000 for the total value of Mr. Muridan's assets. As a result, it is impossible to determine what evidence – if any – was considered by the court when it arrived at this conclusion. See CP 19 at lines 22-24. This failure by itself constitutes reversible error. *Marriage of Horner*, 151 Wn.2d 884, 93 P.3d 124 (2004).

3. The Trial Court's Findings Were Contradicted by the Evidence

Ms. Redl argues that there was “substantial evidence” to support the trial court's valuation because Mr. Muridan testified that he had a \$700,000 contract with JAR Mgmt, but did not “mention any deductions.”

Respondent's Brief at p. 10.

This is a “cherry picked” argument that ignores the undisputed record.

The specific terms of the contract **are part of the record**. See Exhibit 35 (admitted without objection at RP vol. 2, p. 163, lines 15-17).

The contract clearly shows that the gross contract proceeds **were** subject to deductions for both: 1) attorney fees⁷ and 2) a \$75,000 tax lien.⁸ In

⁷ See Exhibit 35, Section 1, p. 1.

⁸ Id at Section 1, p. 1.

addition, the contract called for \$500,000 worth of the payments to be paid on an amortized basis over five years. See Exhibit 35 at Section 2, p. 2.

It is obvious that neither the trial court nor Ms. Redl **ever bothered to read the contract**. Regardless, the contents of the record cannot be ignored. The contract plainly shows that the trial court's valuation of \$700,000 was wrong.

For the foregoing reasons, it is clear that the trial court's valuation **was not** supported by substantial evidence. Moreover, no attempt was made by the trial court to establish a present cash value. Accordingly, the trial court's decision concerning valuation must be reversed.

4. Mr. Muridan's Argument Concerning Value Should Be Allowed Under RAP 2.5(a)

Mr. Redl's only other argument concerning valuation is that since Mr. Muridan's trial attorney (Kathleen Forrest) failed to raise the issue of valuation during the trial, the issue may not be raised on appeal.

It is true that Ms. Forest did not raise this issue at trial. However, RAP 2.5(a) vests this court with discretion to consider any issue raised on appeal, including issues that were not raised at the trial court level. *State v. Blanza*, 182 Wn.2d 827, 828, 344 P.3d 680 (2015).

Although the issue of proper valuation was not raised by Mr. Muridan's trial attorney, the trial court's error concerning the value of the assets is simple and obvious, and not subject to dispute. Given the large

sums of money involved, justice and fairness requires that this error should be addressed by the Court of Appeals.

III. CONCLUSION & COSTS

The decision of the trial court should be reversed and remanded with instructions to vacate the portions of the judgment pertaining to the improper distribution of assets.

Costs to Mr. Muridan should be awarded as set forth in Title 14 of the Rules of Appellate Procedure.

Respectfully dated this 26th day of June, 2017

A handwritten signature in black ink, appearing to be 'Scott McKay', written over a horizontal line.

Scott McKay, WSBA No. 12746
Attorney for Appellant

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON

BY  _____
DEPUTY

DONALD MURIDAN, ,

Petitioner,

No. 49436-1-II

vs.

**CERTIFICATE OF SERVICE OF
REPLY BRIEF**

NICOLE REDL,

[RAP 18.12]

Respondent.

Scott McKay, attorney for the appellant, hereby certifies that he personally served a copy of the Appellant's Reply Brief by personally delivering a true and correct copy of the motion, with Exhibit A, to the Respondent's attorney, Jason Benjamin. Such service was effected on June 26, 2017 at Mr. Benjamin's office at 1201 Pacific Ave Ste C2, Tacoma, WA 98402.

I certify under the penalty of perjury under the law of the State of Washington that the foregoing is known by me to be true and correct.

Dated this 26th day of June, 2017 at Seattle, WA



Scott McKay, WSBA No. 12746
Attorney for Appellant Don Muridan